

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/SB 2932

SPONSOR: Governmental Oversight and Productivity Committee and Senator Bennett

SUBJECT: Procurement by governmental entities

DATE: April 15, 2004 REVISED: 04/16/04 _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>White</u>	<u>Wilson</u>	<u>GO</u>	<u>Fav/CS</u>
2.	<u>Cooper</u>	<u>Yeatman</u>	<u>CP</u>	<u>Fav/1 amendment</u>
3.	_____	_____	<u>AGG</u>	_____
4.	_____	_____	<u>AP</u>	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

The bill revises numerous provisions of statute relating to public procurement. The chief effects of the bill are to:

- Require the listing of subcontractors on bids or proposals submitted in response to solicitations for public construction contracts.
- Authorize agencies to conduct reverse auction procurements, subject to specified exceptions.
- Clarify that exempted purchases specified in s. 287.057(5)(e) and (f), F.S., are not required to be posted pursuant to ch. 120, F.S.
- Authorize agencies to require vendors to submit certified cost or pricing data for specified procurements.
- Provide that purchases of commodities or contractual services by the Department of State for voter education activities do not have to be competitively solicited.
- Authorize the Department of Management Services to determine when PRIDE's or RESPECT's products should be listed on the state term contract or as an exception thereto.
- Require negotiators, who are certified pursuant to criteria established by the Department of Management Services in rule, to conduct state procurements costing in excess of \$1 million.
- Repeal the provision of law that limits charges to state employees, who fly on state aircraft on a space available basis, to the vehicle mileage allowance amount.
- Require competitive solicitation of specified revenue generating contracts executed by the Department of Corrections.
- Require the Agency for Health Care Administration to contract for the development of an Integrated Recipient Data Management Pilot Project.
- Repeal outdated provisions in, and make technical changes to better organize, ch. 287, F.S.

The bill amends ss. 255.0515, 255.0525, 283.425, 287.012, 287.025, 287.042, 287.056, 287.057, 287.16, 287.161, 287.17, 945.025, and 946.515 of the Florida Statutes. The bill repeals 287.045(11) and 287.1345 of the Florida Statutes. The bill creates ss. 287.0565, 287.0571, 287.0575, 287.0815, 408.919, and 945.025 of the Florida Statutes.

II. Present Situation:

Florida's Competitive Procurement Legislation—Since at least the early 1900's, Florida has statutorily required competitive procurement by governmental entities in one form or another.¹ Competitive procurement requirements are not required by the Constitution, nor by common law; rather, such requirements are purely statutory in nature and all states in this nation have them in varying forms.

Public Construction Contracts: Chapter 255, F.S., which relates to public property and publicly-owned buildings, provides competitive procurement requirements that include the following:

- Counties, municipalities, special districts, and other political subdivisions must competitively award a contract for the construction or improvement of a public building, structure, or other public construction work that exceeds the cost of \$200,000.² The term “competitively award” refers to sealed bids, proposals in response to a request for qualifications or proposals, or proposals for competitive negotiation.³
- State agencies are required to competitively award construction project contracts that cost in excess of \$200,000.⁴ Competitive sealed bids must be solicited by state agencies, unless the Secretary of the Department of Management Services (DMS) determines that competitive negotiation of the construction contract is in the best interest of the state.⁵

Section 255.0525(1), F.S., requires that advertisements for the solicitation of bids or proposals on a state construction project in excess of \$200,000 must be published at least once in the Florida Administrative Weekly (FAW) at least 21 days before the bid opening. If the project costs more than \$500,000, publication must be in the FAW and in a newspaper within the relevant county at least 30 days before the bid opening. Similarly, s. 255.0525(2), F.S., requires counties, municipalities, and other political subdivisions to advertise solicitations of bids or proposals for construction projects in excess of \$200,000 in a newspaper within the relevant county at least 21 days before the bid opening. If the political subdivision construction project costs more than \$500,000, the advertisement must be published at least 30 days before the bid opening.

State procurement of commodities and contractual services: The Department of Management Services (DMS) is the centralized authority statutorily tasked with overseeing state agency procurement of commodities and contractual services and with creating uniform rules for

¹ See Ch. 5969, Acts 1909 (1909 Legislature passed statute requiring county commissioners to award certain bids to lowest bidder).

² Section 255.20(1), F.S.

³ *Id.*

⁴ Section 255.29; Chapter 60D-5, F.A.C.

⁵ Rule 60D-5.0073, 60D-5.008, and 60D5.0091, F.A.C.

procurement.⁶ The state purchasing process is also partly decentralized. Except in the case of state term contracts,⁷ agencies may purchase commodities and services themselves, rather than placing orders through the DMS.

Chapter 287, F.S., sets forth the competitive solicitation requirements applicable to state agencies when purchasing commodities⁸ and contractual services.⁹ An agency is defined as “the various state officers, departments, boards, commissions, divisions, bureaus, and councils and any other unit of organization . . . of the executive branch of state government,” but does not include state universities.¹⁰

An agency contracting for the purchase of commodities or contractual services in excess of \$25,000 must use one of the following procurement methods:

- Invitation to bid (ITB): The agency must issue an ITB that details the commodities or services sought, the time and date for receipt of bids and of the public opening, all contractual terms, and the contractual terms and conditions, including the criteria to be used in determining acceptability of the bid. The contract must be awarded to the lowest responsible and responsive bidder.¹¹
- Request for proposals (RFP): If the agency determines in writing that the use of an ITB is not practicable, it may issue a RFP that identifies the commodities or services sought, the time and date for receipt of proposals and of the public opening, and the contractual terms and conditions, including the criteria to be used in determining acceptability of the proposal.¹²
- Invitation to negotiate (ITN): If the agency determines in writing that use of an ITB or RFP will not result in the best value to the state, the agency may use an ITN that includes a statement of the commodities or services sought, the time and date for receipt of replies and of the public opening, and all terms and conditions applicable to the procurement, including the criteria to be used in determining acceptability of the reply.¹³

To allow for circumstances wherein procurement of commodities or services with an ITB, RFP, or ITN is not possible, ch. 287, F.S., also permits emergency¹⁴ and single source procurements.¹⁵ Further, the chapter exempts the following commodities and contractual services from its

⁶ Sections 287.032 and 287.042, F.S.

⁷ The DMS is authorized to establish state term contracts for commodities and contractual services. These contracts establish prices for items and designate vendors with whom orders must be placed. State agencies are required to use state term contracts, except where the DMS exempts the contract from required usage or the contract contains a user surcharge. Section 287.056, F.S.

⁸ Commodities are supplies, materials, goods, merchandise, food, equipment, information technology, and other personal property, including portable structures less than 5,000 square feet. Excluded are commodities purchased for resale, prescriptions and medical devices required by health care providers, and printing pursuant to s. 283.33, F.S. Section 287.012(5), F.S.

⁹ Contractual service is an independent contractor’s rendering of its time and effort, rather than the furnishing of specific commodities. Excluded are construction contracts entered pursuant to ch. 255, F.S. Section 287.012(9), F.S.

¹⁰ Section 287.012(1), F.S.

¹¹ Section 287.057(1), F.S.

¹² Section 287.057(2), F.S.

¹³ Section 287.057(3), F.S.

¹⁴ Section 287.057(5)(a), F.S.

¹⁵ Section 287.057(5)(c), F.S.

competitive procurement requirements: artistic services, academic program reviews, lectures by individuals, auditing services, legal services, health services, services provided to persons with mental or physical disabilities by not-for profit corporations, certain Medicaid services, family placement services, certain prevention services, training and education services provided to injured employees, contracts for the construction and maintenance of state highways and other roads, services provided by governmental agencies, and certain continuing educational events offered to the public.¹⁶

My Florida Market Place: During the 2000 Regular Session, legislation was enacted that directed the State Technology Office, administratively housed within the DMS,¹⁷ to develop a program for online procurement of commodities and contractual services.¹⁸ Subsequently, the DMS executed a contract with Accenture, L.L.P. for the development and implementation of this program, now known as My Florida Market Place (MFMP).

Statute requires state executive agencies, and permits eligible users, to participate in MFMP.¹⁹ Only bidders who have prequalified may participate in the program. The DMS is required to promulgate rules for the program that include establishing bidder qualification criteria, criteria for eligible commodities and contractual services, procedures for access to MFMP, and any criteria warranting an exception to participation in MFMP.²⁰

MFMP went live in 2003 and the DMS is in the process of phasing state agencies in as users. Currently, the Departments of Management Services, Transportation, Citrus, Health, Juvenile Justice, Children and Families, and Veterans Affairs, and the Executive Office of the Governor are utilizing MFMP.

The DMS is authorized to collect fees that at minimum must fund the costs of MFMP.²¹ The fees may be assessed on either an individual transaction basis or as a fixed percentage of the cost savings generated.²² Currently, the DMS is requiring vendors to pay a fee of one percent of each MFMP transaction's price. Statute authorizes Accenture to retain a portion of fees collected as compensation and provides that all fees and surcharges collected under the paragraph are to be deposited in the Grants and Donation Trust Fund.²³ Pursuant to the DMS's contract with Accenture, the fees are utilized to pay the DMS's legislative budget request and to pay Accenture's compensation that may be as much as \$150 million over the five-year term of the contract.

III. Effect of Proposed Changes:

Public construction contracting

Currently, s. 255.0515, F.S., prohibits the substitution of any subcontractors listed on a bid or proposal submitted in response to a state solicitation for specified construction services. **Section**

¹⁶ Section 287.057(5)(f)-(g), F.S.

¹⁷ Section 282.102, F.S.

¹⁸ Ch. 2000-164, L.O.F., now s. 287.057(23), F.S.

¹⁹ Section 287.057(23), F.S.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

1 amends this section to require, rather than permit as provided in current law, the listing of subcontractors on such bids or proposals and expands the application of this section to counties, municipalities, and other political subdivisions of the state.

Section 2 amends s. 255.0525, F.S., to add authority for the state and its counties, municipalities, and other political subdivisions to electronically post competitive solicitations.

Public printing procurement

Section 3 amends s. 283.425, F.S., which provides the process for an executive agency's acceptance of defective printing, to provide that liquidated damages for defective printing accepted out of necessity may be up to one-half of the contract price, as specified in the contract, rather than current law's stipulation that liquidated damages are fixed at one-half of the contract price.

Definitions

Section 4 amends s. 287.012, F.S., the definitional section for the chapter, as follows:

- In subsection (8), the term, "contractor" is amended to also mean a person who enters into an arrangement with an agency, such as an alliance, partnership, or consortium, for the purpose of acquiring commodities or contractual services for or on behalf of the agency.
- In subsection (12) the term "eligible user" is expanded to include certain nursing home facilities as defined in s. 400.21, F.S.
- In subsection (13), the term, "exceptional purchase" is amended to clarify that it does not include purchases pursuant to ss. 287.057(5)(e) and (f), F.S., which exempt specific commodities and contractual services from the chapter's competitive solicitation requirements. The effect of this amendment is to clarify that an agency need not post a protestable notice that it intends to make an exempted purchase, as is required by ch. 120, F.S., for other ch. 287, F.S., purchases.
- Subsection (27) is added to define the term "Secretary" as the Secretary of Management Services.

Insurance

Section 5 amends s. 287.025, F.S., the section that prohibits agencies from purchasing insurance for specified items, to strike the prohibition on the purchase of insurance for museum collections, artifacts, relics, or fine arts.

DMS's powers and duties

Section 6 amends s. 287.042, F.S., relating to DMS's powers and duties as follows:

- Paragraph (1)(a) is amended to provide that the DMS shall maintain its vendor list by classes of commodities and contractual services. This provision is currently contained in paragraph (3)(a), which is repealed by the bill.
- Paragraphs (1)(c) and (1)(g) are amended to provide that products offered by PRIDE or RESPECT may in the department's discretion be listed on a state term contract or as an exception to the state term contract. Paragraph (1)(c) is also amended to transfer its provision regarding contractual vendor liability to paragraph (4)(a). Paragraph (1)(g) is renumbered as paragraph (1)(d).

- Paragraph (1)(f) is amended to delete reference to testing of PRIDE products by the Department of Agriculture and Consumer Services, as the department no longer conducts this testing, and the paragraph is renumbered as subparagraph (1)(c)3.
- Paragraph (1)(h) is amended to repeal an obsolete provision that authorizes the DMS to collect fees for the use of electronic information systems.
- Subparagraph (3)(a)2. is amended to remove an outdated requirement for specified Florida Administrative Weekly publication that expired on July 1, 2003.
- Paragraph (4)(a) is amended to make grammatical changes.

Products with recycled content

Section 7 repeals s. 287.045(11), F.S., that requires each agency to annually report to the DMS on the agency's total expenditures for, and use of, products with recycled content, and that requires the DMS to annually provide a summary of the agencies' reports to the Legislature.

State term contracts

Section 8 amends s. 287.056(1), F.S., to add that an agency need not purchase from state term contracts if the agency is exempted by DMS rule. Further, the bill repeals s. 287.056(2), F.S., which permits agencies in their discretion to purchase from state term contracts that contain a surcharge and **Section 14** repeals s. 287.1345, F.S., which authorizes the assessment of the state term contract surcharge.

Procurements less than \$25K

Section 9 creates s. 287.0565, F.S., to authorize the DMS to adopt rules that prescribe methods for procurements of commodities and contractual services that cost less than \$25,000.

Request for proposals

Section 10 amends s. 287.057(2), F.S., to provide that an RFP may be used when an ITB is not likely to result in the best value to the state, rather than current law's provision that an RFP may be used when an ITB is not practicable. Further, the bill, in order to make the provision for RFPs consistent with the provision for ITNs, provides that a contract in an RFP procurement shall be awarded based on the proposal that will result in the best value, rather than the proposal that will be the most advantageous as is provided in current law.

Invitation to negotiate

Section 10 amends s. 287.057(3), F.S., to provide that an ITN may be used when an ITB or RFP is not likely to result in the best value to the state, rather than current law's provision that an ITN may be used when an ITB or RFP will not result in the best value to the state.

Purchases for voter education activities

Section 10 creates s. 287.057(5)(f)14., F.S., to provide a competitive procurement exemption for contractual services or commodities purchased by the Department of State for voter education activities from a Supervisor of Elections Office or a nonprofit professional association adjunct to that office.

Purchases from other governmental entities

Section 287.042(16)(a), F.S., currently permits the DMS to authorize agencies, when such is in the best interest of the state, to purchase from contracts let by the federal government, another

state, or a political subdivision. **Section 6** amends this section to require such contracts to have been competitively procured and to extend the DMS's approval authority to contracts executed by political subdivisions in other states.

Section 10 amends s. 287.057(5)(f)7., F.S., to expand the existing exemption from the competitive solicitation requirements of this section for non-profits providing service to persons with disabilities to include for-profit entities.

Section 287.057(5)(f)13., F.S., which permits agencies to purchase commodities and contractual services provided by governmental agencies without competitive solicitation, is amended in **Section 10** to add that this authority includes commodities or contractual services provided by: state universities and colleges; accredited, independent nonprofit colleges and universities; the federal government or any department, commission, or other instrumentality thereof; and other states and their agencies. Section 287.057(22), F.S., which exempts agency purchases of services from accredited, independent nonprofit colleges and universities is repealed by **Section 10** to eliminate duplication.

Certified negotiators

Section 10 amends s. 287.057(17)(b), F.S., to provide that at least one of the persons who conduct agency negotiations for a contract in excess of \$1 million must be a certified negotiator. The DMS is directed to adopt rules establishing the qualifications for certification. Further, in the event an agency does not have a certified negotiator, the bill directs the DMS to select a certified negotiator from another agency or to contract with a certified negotiator to participate in the procuring agency's negotiations.

Conflict of interest

Section 287.057(18), F.S., currently provides that a person, who has received a non-competitively procured contract to conduct a feasibility study for the implementation of a contract, participated in the drafting of the solicitation for a contract or developed a program for future implementation, may not contract with an agency for contracts dealing with that specific subject matter. **Section 10** extends this prohibition to subcontracting with the agency directly or indirectly as to that subject matter.

Online procurement

Section 10 should²⁴ renumber s. 287.057(23), F.S., as s. 287.057(22), F.S., and amends the subsection to repeal the requirement that: (a) vendors must prequalify before participating in the online procurement system; and (b) criteria for commodities and contractual services eligible for the online procurement system be established. The bill also amends the subsection to provide that fees for the online procurement system may be imposed on an individual transaction basis and may not exceed one percent of each transaction. Further, the bill provides that all fees collected must be deposited in the Grants and Donations Trust Fund.

Given the authorization for the online procurement fee, the bill repeals s. 287.1345, F.S., which permits the DMS to impose a surcharge for state term contracts.

²⁴ This appears to be a technical deficiency.

Reverse auctions

Section 11 creates s. 287.0571, F.S., to authorize agencies to conduct reverse auctions. A reverse auction is defined as an open and interactive process that is conducted through the online procurement system; that permits vendors to electronically submit prices during a specified time period for the purpose of competing to provide the lowest price; and that updates and reveals submitted prices to all participating vendors on a real-time basis.

The bill provides that a reverse auction may be used as a pricing method for ITB, RFP, and ITN procurements if the solicitation: identifies all terms and conditions applicable to the conducting of, and participation in, a reverse auction; identifies the times and dates between which prices will be received; and contains all information otherwise required by Part I of ch. 287, F.S., for competitive solicitations. Further, the bill provides that reverse auctions may not be used for procurements of construction services, printing, and systems for modular furniture and workstations, and requires the DMS to adopt rules prescribing procedures for reverse auctions.

Truth-in-negotiations

Section 12 creates s. 287.0575, F.S., to permit agency heads to require vendors to submit certified cost or pricing data prior to the award or modification of a contract costing in excess of \$1 million if the cost or price is not: (a) based on adequate price competition; (b) based on established catalogue or market prices; or (c) set by law or rule. If cost or pricing data is required:

- The requirement must apply to all vendors under consideration at that time.
- The data must be provided by the vendor within 15 calendar days of the agency's request, unless a written extension is granted.
- The data must be accompanied by a written truth-in-negotiation certificate executed by the vendor, subject to penalties of perjury, which certifies that the data is accurate, complete, and current.
- Vendor books and records related to the data:
 - May be audited by the agency, upon request, up to one year after termination of the contract; and
 - Must be maintained by the vendor for five years after the date of final payment under the contract or after the date that resolution of a contract or contract modification price adjustment occurs, whichever is later.
- An agency may adjust the price of a contract or modification to exclude any sums included in the price that are based on inaccurate, incomplete, or outdated cost or pricing data.

The term "cost or pricing data" is defined for purposes of the section to mean all facts that a prudent buyer or seller would reasonably expect to affect cost or price negotiations as of the date that the contract or contract modification price is determined or another date agreed upon by the parties.

Section 13 creates s. 287.0815, F.S., to define "outsourcing contract" as a contractual relationship between an agency and a private entity for the provision in whole or in part of a public function or responsibility. The term "agency" is defined as any official, officer, commission, board, authority, council, committee, or department of the executive branch of state

government. This provision also requires the department to produce a monthly report relating to these contracting provisions.

Section 14 repeals s. 287.1345, F.S., which authorizes the assessment of the state term contract surcharge.

Motor vehicles and aircraft

Section 15 amends s. 287.16, F.S., to repeal the requirement that the DMS maintain, repair, and store state motor vehicles, aircraft, and watercraft, and adds that the DMS may contract for the maintenance and repair of motor vehicles.

Section 16 amends s. 287.161, F.S., to: (a) add a conforming reference that the executive aircraft pool may consist of state-leased aircraft; (b) repeal the provision that limited charges to state employees flying on state aircraft on a space available basis to no more than the vehicle mileage allowance amount; and (c) reenact the provision in subsection (4), which repeals at the end of FY 2003-2004 and which states that it is the intent of the Legislature that the executive aircraft pool be operated on a full-cost recovery basis, less available funds.

Section 17 amends s. 287.17, F.S., to require state agency heads to annually conduct a review of the agency's motor vehicle utilization, and to require that a copy of the review be provided to the DMS, rather than the Office of Program Policy Analysis and Government Accountability.

Integrated Recipient Data Management Pilot Project

Section 18 creates s. 408.919, F.S., to require the Agency for Health Care Administration (AHCA) in partnership with the Agency for Workforce Innovation, and the Departments of Children and Families, Health, and Revenue to develop an integrated recipient data management pilot project database. The database must provide immediate responses to queries by the aforementioned agencies regarding a recipient's status with a state programs and services. The AHCA is to obtain federal funds for this system to the extent possible.

The bill directs the AHCA to contract with a vendor for the development of the pilot project, and provides that the vendor must be capable of linking national public records data with existing state data relating to program recipients and providers; must be able to access the data within five seconds; must have batch processing capabilities in the tens of terabytes range; must be able to provide a globally unique identifier for each recipient; and must be able to insure that program recipient data that is exempt or confidential can be redacted when a public records request is made. Additionally, the vendor must be: experienced in handling and integrating different types of public and proprietary data; able to process unstructured text; and able to complete data integration within 120 days after contract execution.

Competitive solicitation for revenue generating contracts

Section 19 creates s. 945.025(4)(b), F.S., to require competitive procurement of Department of Corrections' contracts wherein the department receives revenue in exchange for authorizing a vendor to use governmental authority or property to sell goods or services. The sum of the estimated gross revenues to be generated under the contract for the state and the contractor must exceed \$25,000 in order for the requirement to apply.

Section 20 amends s. 946.515(2), F.S., to make conforming changes.

Conforming changes

The bill makes conforming changes for the bill's amendments discussed above in ss. 287.012, 287.017, 287.022, 287.042, 287.057, 287.09451, 288.703, and 946.515, F.S.

Effective date

Section 21 provides that it takes effect on October 1, 2004, except that the section of the bill creating s. 287.0575, F.S., takes effect on that date only if House Bill 1889 or similar legislation takes effect during the same legislative session or an extension thereof.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

As discussed in "Government Section Impact," below, vendors providing commodities or contractual services may realize a reduction in profit given the bill's truth-in-negotiation and reverse auction authorizations.

C. Government Sector Impact:

The following provisions of the bill may result in a reduction in state expenditures for commodities and contractual services:

- Truth-in-negotiations: The bill's authorization for agencies to collect cost or pricing data may result in agency reductions of contract prices that are not supported by cost or pricing data provided by a vendor.
- Reverse auctions: The bill's authorization of reverse auctions for the procurement of commodities and contractual services may increase price

competition by allowing vendors to view the lowest current price, and may result in lower prices for the state.²⁵

The bill amends s. 287.057(23), F.S., to require usage fees for the MFMP system to be deposited in the Grants and Donations Trust Fund and to repeal current law that permits the vendor providing the MFMP system to retain a portion of the fees as compensation. As such, all fees must be deposited in the Grants and Donations Trust Fund and will be subject to the General Revenue service charge and to appropriation.

Fiscal impact information for the bill's requirement in s. 408.919, F.S., that the Agency for Health Care Administration develop an Integrated Recipient Data Management Pilot Project has not been received as of the date of this analysis.

State employees, who fly on state aircraft on a space available basis, may be required to pay more for the flight given the bill's repeal of current law that limits charges to no more than the vehicle mileage allowance.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

1 by Comprehensive Planning Committee:

This amendment restores current statutory language in s. 287.057(5)(f)7., F.S., which exempts non-profit corporations from competitive bidding requirements when providing service to persons with disabilities.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.

²⁵ The federal Department of Defense has been conducting reverse auctions since 2000, and has reported the achievement of significant savings; e.g., the Navy reported saving 28 percent with its first reverse auction on the price of recovery sequencers used in airplane ejection seats. *See Wielding the Virtual Gavel – DOD Moves Forward with Reverse Auctions*, 173 MILLR 1, 7 (September 2002).